A **BLUE VALLEY PLANTATION BHD**

v.

PERIASAMY KUPPANNAN & ORS

B COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
SULONG MATJERAIE JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: A-02(IM)-972-2009]
C 17 FEBRUARY 2010

CIVIL PROCEDURE: *Striking out - Winding up petition - Inordinate and unexplained delay - Abuse of process - Rules of the High Court 1980, O. 18 r. 19(1) - Companies Act 1965, s. 218(1)(e)*

D ***COMPANY LAW:*** *Winding up - Petition - Striking out - Inordinate and unexplained delay - Abuse of process - Rules of the High Court 1980, O. 18 r. 19(1) - Companies Act 1965, s. 218(1)(e)*

WORDS & PHRASES: *"at any stage of the proceedings" - Rules of the* E *High Court 1980, O. 18 r. 19(1) - Interpretation of*

This was an appeal against the decision of the High Court judge dismissing the appellant's application to strike out the respondents' winding up petition pursuant to O. 18 r. 19(1)(a) and O. 92 r. 4 F of the Rules of the High Court 1980 ('RHC'). The respondents filed the petition due to an alleged failure by the appellant to comply with a demand notice that they had served on the appellant under s. 218(1)(e) of the Companies Act 1965. The appellant, in its striking out application, contended that the petition disclosed no G reasonable cause of action as the s. 218 notice was null and void. The High Court judge dismissed the appellant's application, resulting in the present appeal.

Held (dismissing the appeal)
H **Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:**

(1) There was an inordinate and unexplained delay on the part of the appellant in making the striking out application. The petition was filed on 1 November 2000. However, the O. 18 I r. 19 application was filed only on 7 November 2008, some

eight years later. Although O. 18 r. 19(1) of the RHC states that "The court may at any stage of the proceedings order to be struck out ...", the words "at any stage of the proceedings" should not be literally interpreted so as to mean that a party to a proceeding is at liberty to make the striking out application at any time he wishes however so late. As a general rule the application must be made promptly and, in any event, it should not be allowed after a very long delay, and all the more so where the long delay is unexplained. If, indeed, the appellant had taken the position that the petition disclosed no reasonable cause of action, it should have then taken prompt action to make the striking out application instead of doing it some eight years later. This very long delay was clearly unreasonable. The appellant should not have sat so long on its right to make the application. This application, made at such a late stage, was prejudicial to the respondents and it would be unjust to them if it were to be allowed. Indeed, the application, by reason of the very long delay, was an abuse of process. *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* (foll). (paras 8, 9 & 10)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi menolak permohonan perayu untuk membatalkan petisyen penggulungan responden-responden menurut A. 18 k. 19(1)(a) dan A. 92 k. 4 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Responden-responden memfailkan petisyen tersebut disebabkan suatu tomahan kegagalan oleh perayu untuk menurut suatu notis tuntutan yang mereka telah menyampaikan ke atas perayu di bawah s. 218(1)(e) Akta Syarikat 1965. Perayu, dalam permohonan pembatalannya, mendakwa bahawa petisyen tersebut tidak mendedahkan apa-apa kausa tindakan yang munasabah kerana notis s. 218 tersebut adalah batal dan tak sah. Hakim Mahkamah Tinggi menolak permohonan perayu, mengakibatkan timbulnya rayuan semasa.

Diputuskan (menolak rayuan)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Terdapat kelewatan yang melampau dan tidak dijelaskan oleh pihak perayu dalam membuat permohonan pembatalan tersebut. Petisyen tersebut difailkan pada 1 November 2000. Walau

bagaimanapun, permohonan A. 18 k. 19 tersebut hanya difailkan pada 7 November 2008, kira-kira lapan tahun selepas itu. Meskipun A. 18 k. 19(1) KMT menyatakan bahawa "Mahkamah boleh pada mana-mana peringkat dalam prosiding mengarahkan untuk dibatalkan ...", perkataan-perkataan "pada mana-mana peringkat dalam prosiding" tidak seharusnya ditafsirkan secara literal untuk bermaksud bahawa sesuatu pihak kepada satu prosiding bebas untuk membuat permohonan pada mana-mana masa yang beliau ingin walaupun begitu lewat. Sebagai rukun am permohonan mesti dibuat dengan cepat dan, walau apapun, ia sepatutnya tidak dibenarkan selepas suatu kelewatan yang amat panjang, dan lebih-lebih lagi di mana kelewatan yang panjang itu tidak dijelaskan. Jika, sebenarnya, perayu telah mengatakan bahawa petisyen tersebut tidak mendedahkan suatu kausa tindakan yang munasabah, ia sepatutnya mengambil tindakan yang cepat untuk membuat permohonan pembatalan dan bukan membuatnya kira-kira lapan tahun kemudian. Kelewatan yang amat panjang ini jelas tidak munasabah. Perayu tidak seharusnya menunggu begitu lama untuk melaksanakan haknya membuat permohonan tersebut. Permohonan ini, yang dibuat di peringkat yang begitu lewat, memprejudiskan responden-responden dan ia merupakan tidak adil kepada mereka jika ia dibenarkan. Sebenarnya, permohonan tersebut, disebabkan kelewatan yang panjang tersebut, adalah suatu penyalahgunaan proses. *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* (diikuti).

Case(s) referred to:

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] CLJ 472 (Rep) [1987] 1 CLJ 572 HC ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2003] 8 CLJ 265 HC ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (2)(a)

Rules of the High Court 1980, O. 18 r. 19(1)(a), O. 92 r. 4

Other source(s) referred to:

Malaysian Court Practice, 2007 Desk Edition, High Court I, p 240, para 18.19.1

For the appellant - Dato' Dr Cyrus Das (LA Gomez, A Silvanathan & Dato' V Manoharan with him); The Law Offices of LA Gomes, Meor Shaazizi & Assoc

For the respondents - VS Viswanathan (A Mariadass with him); M/s Mariadass Lock & Ainudin

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal from the decision of the learned judge of the High Court of Ipoh who, on 22 May 2009, had dismissed the appellant's (the respondent at the winding up proceedings before the High Court) application to strike out the respondents' (the petitioners at the winding up proceedings before the High Court) winding up petition pursuant to O. 18 r. 19(1)(a) and O. 92 r. 4 of the Rules of the High Court 1980.

[2] The petition filed by the respondents was pursuant to an alleged failure to comply with a demand notice that they had served on the appellant pursuant to s. 218(1)(e) of the Companies Act 1965. The notice of demand is based on an Ipoh High Court consent order dated 18 October 1996 obtained by the respondents against the appellant *vide* Ipoh High Court Petition No. 26-3-1995 wherein the appellant was ordered, *inter alia*, to pay various sums of money to the respondents.

[3] The contention of the appellant in their striking out application is that the petition discloses no reasonable cause of action as (allegedly) the s. 218 notice is null and void being in contravention of s. 218(2)(a) of the Companies Act.

[4] Before the High Court the respondents opposed the application. They filed an affidavit complaining, among others, the very long delay on the part of the appellant in making the

application. The appellant responded by filing an affidavit in reply. In their affidavit they had the opportunity to explain for the delay. But they chose not to do so. They merely averred:

> **8. Delay**
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> In regards to paragraph 9 of 'Ramasamy's affidavit', I am advised that my solicitor will submit on the grounds of *ex-debito justitae* at the hearing.

[5] The learned High Court Judge, in dismissing the appellant's application, unfortunately did not furnish his grounds of judgment. So we do not know the reason of his decision.

[6] Be that as it may, on our part, having heard submissions from Dato' (Dr.) Cyrus Das, the learned counsel for the appellant (the applicant/respondent before the High Court) and Encik Viswanathan, the learned counsel for the respondents (the respondents/petitioners before the High Court), we had dismissed the appeal with costs.

[7] We now give our reason.

[8] Although the learned counsel for the respondents, in opposing the appeal, has put forward several arguments, we have, however, dismissed the appeal of the appellant, Blue Valley Plantation Berhad (that is, the respondent in the winding up petition proceeding below), on only one ground: that is of inordinate and unexplained delay on the part of the appellant in making the striking out application. The petition was filed on 1 November 2000. However, the O. 18 r. 19 application was filed only on 7 November 2008, that is to say, some eight years later.

[9] Now, although we are mindful of the provisions of O. 18 r. 19(1) which states:

> (1) The Court may at any stage of the proceedings order to be struck out … (emphasis added)

nevertheless, we do not think that the words 'at any stage of the proceedings' should be literally interpreted so as to mean that a party to a proceeding is at liberty to make the striking out application at any time he wishes however so late. We take the view that as a general rule the application must be made promptly and,

in any event, it should not be allowed after a very long delay, and all the more so where the long delay is unexplained (see *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 and *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472; and *Malaysian Court Practice*, 2007 Desk Edition, High Court I, p. 240 para. 18.19.1).

[10] If, indeed, the appellant has taken the position that the petition discloses no reasonable cause of action, then, they should have taken prompt action to make the striking out application, instead of doing it some eight years later. This very long delay is, to our mind, clearly unreasonable. The appellant should not have sat so long on their right to make the application. In our view, this application made at such a very late stage is prejudicial to the respondents. It is unjust to them if we were to allow this application. Indeed, the application, by reason of the very long delay, is an abuse of process. In this regard, we share the sentiment as eloquently expressed by VT Singham J in *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* [2003] 8 CLJ 265 (also a case of an application to strike out a winding-up petition pursuant to O. 18 r. 19) where the learned judge said (at p. 318):

> As to the delay, this court is mindful that a party wishing to strike out proceedings could do so 'at any stage of the proceedings' under Order 18 r 19 but the fact that the party is allowed to do so at any stage of the proceedings does not mean the party can sleep on its rights, insist on the petitioners to proceed with the hearing on its merits and then wake up after a long period and during the midst of the hearing seek the indulgence of the court to strike out the petition for abuse of the process of the court where such right to apply was available to the respondents as early as in 1998 or even in 1999 or even in 2000. The words 'at any stage of the proceedings', in the view of this court must be given a purposive interpretation and cannot be applied at the 'whims and fancies' of any individual litigant though it gives the impression that there are no conditions attached.

[11] In the light of our decision above, we are of the view that it is not necessary for us to consider the other arguments advanced by the parties in this appeal.

A [Appeal dismissed with costs; order of the High Court affirmed.]

[After hearing submissions on the issue of costs, the respondents were awarded costs of RM10,000; deposit to the respondents towards account of costs.]

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